

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**





76-2111

IN THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

NO. # 76-2111

DEC 1 1976

~~THE UNITED STATES OF AMERICA~~  
~~ex rel:~~

WARREN GRAVES,

Plaintiff-Appellant

-Vs-

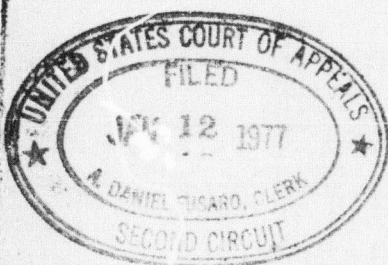
ENNIS JO OLGIATI, Chairman of the  
New York State Board of Parole,

Defendant-Appellee

APPEAL FROM THE JUDGMENT OF THE NORTHERN DISTRICT COURT  
DENYING APPELLANT'S COMPLAINT FILED PURSUANT TO TITLE 42  
SECTION 1983 OF THE U.S.C.A. FOR THE DEPRIVATION OF  
CONSTITUTIONAL RIGHTS.

Brief for Appellant:

+  
Appellant



Warren Graves 75-A-3661  
WARREN GRAVES  
Appellant-pro se  
135 State Street  
Auburn, New York  
13021

sworn to before me this  
22 day of November 1976

Dorothy J. Burns  
Notary Public

DOROTHY J. BURNS  
Notary Public, State of New York  
No. 1482  
Qualified in Cayuga County  
Commission Expires March 30, 1978



IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE UNITED STATES OF AMERICA  
ex rel.:  
WARREN GRAVES,  
Plaintiff-Appellant

-Vs-

ENNIS J. OLGIATI, Chairman of the  
New York State Board of Parole,  
Defendant-Appellee

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.....STATEMENT OF ISSUES PRESENTED FOR REVIEW.....

1. Whether the District Court's dismissal of Appellant's Complaint was justified and predicated upon an unrelated issue filed in a State Court pursuant to Civil Practice Law and Rules of New York State, Article 78 Proceedings in the Nature of Mandamus seeking re-appearance before the Parole Board and for an Order to Show Cause why a Meaningful Reason was not afforded appellant.
2. Whether the District Court improperly denied appellant's Complaint by erroneously relying upon a inapposite State Court decision as a praxis for said dismissal and denial.

.....STATEMENT OF THE CASE.....

This case is before the court upon Appeal from a judgment of the District Court (Northern Dist.) entered on July 19, 1976 providing that: "...WHERE A CONSTITUTIONAL ISSUE IS ACTUALLY RAISED IN THE STATE COURT, AS IT CAN BE IN AN ARTICLE 78 PROCEEDING...THE LITIGANT HAS MADE HIS CHOICE AND MAY NOT HAVE TWO BITES AT THE CHERRY".

Plaintiff-appellant filed in the Northern District Court on the 27th day of May, 1976, a Civil Action pursuant to the provisions of Title 42 U.S.C., section 1983 for the deprivation of Civil and Constitutional Rights naming ENNIS J. OLGIATI, Chairman of the New York State Board of Parole as



defendant therein. The matter contended that the New York State Board of Parole had arbitrarily and illegally altered and extended Plaintiff-appellant's maximum expiration date far beyond the date as set by the sentencing Court.

Appellant, a parolee released from a New York State Correctional Facility and under the supervision of the New York State Division of Parole, was arrested on the 17th day of June 1974 for the alleged crime of Attempted Rape. That on August 1st, 1974 a Parole Violation Warrant was issued against Appellant herein. That during the detention of appellant at the Kiker's Island House of Detention for Men, appellant reached his sentence's maximum expiration and the above said Parole Detainer Warrant (#44305) was duly withdrawn by Parole Authorities and appellant was subsequently released upon bail status.

Appellant was tried and convicted in the Supreme Court of the State of New York, County of Kings, on the 5th day of May, 1975 and was sentenced to a term of from three to six years (3-6) on the 5th day of June, 1975.

Appellant appeared before the Parole Board on March 16th, 1976 as he reached his court-set minimum term and was denied parole release providing: " YOU WERE UNDER PAROLE SUPERVISION ON A BURGLARY CHARGE AT THE TIME OF THE ARREST AND CONVICTION OF THE INSTANT OFFENSE. YOUR RELEASE AT THIS TIME WOULD BE A MOCKERY OF JUSTICE." That upon the above reason used to deny appellant parole, appellant duly filed to the Cayuga County Court (Supreme Court), an Article 78 Proceeding in the Nature of Mandamus, pursuant to the Civil Practice Law



and Rules of the State of New York, naming Ennis J. Olgiati as respondent seeking judgment for an Order to Show Cause why the appellant should not be released upon Parole Status. The afore-mentioned application alleged that the decision as rendered by the Board denying Parole was solely predicated upon the assumption that plaintiff-appellant at the time of the instant conviction was under Parole status. The argument as set forth in the application discredited the validity of the Declaration of Delinquency prepared by the Parole authorities before appellant's conviction due to the absence of a Parole violation Warrant and Notice of Violation at the time of the new conviction. It was further contended that appellant's time could not be held in abeyance or stopped as the Detainer Warrant had been lifted on appellant's maximum expiration date and that the parole authorities was without the jurisdiction to reinstate appellant's maximum expiration date after it had legally expired being predicated by a conviction four (4) months subsequent to the withdrawing of the Detainer Warant.

The Supreme Court of the State of New York, County of Cayuga, (White, J.) dismissed the appellant's application on the 13th day of May 1976 stating: " THAT THE PAROLE BOARD CAN REINSTATE AN EXPIRATION DATE AFTER IT HAS LEGALLY EXPIRED, CHANGE THAT DATE, AND CHARGE A MAN WITH A PAROLE VIOLATION." (Graves V. Olgiati, Index No. 76-3161, supra).

Plaintiff-appellant contended in his complaint that the New York State Board of Parole surreptitiously, and without the knowledge of appellant and the sentencing court, lodged



a Parole Violation Warrant against appellant which was not disclosed prior to appellant's appearance before the Parole Board on March 16, 1976.

.....ARGUMENT.....

Appellant contends that he was not under Parole Supervision at the time of his trial and conviction of May 15, 1975. That his maximum expiration date expired on January 6, 1975. Since the presumption of innocence is not to be eradicated and as appellant's alleged violation stemmed from the arrest of June 17, 1974 upon the new charge, he could not be declared delinquent due to the failure of the Parole Authorities to issue Notice of Violation of Parole and to afford appellant with the requisite Preliminary and Final Revocation Hearing as mandated by law for suspected violators. Approximately eleven months had elapsed without a Notice of Violation being served upon appellant. In addition to the above, appellant was notified by the Parole Officer who withdrew the Detainer Warrant that appellant was no longer under Parole supervision necessitating the Warrant's withdrawal. Yet, the very same Warrant was lodged arbitrarily after the conviction of Appellant without his knowledge. The above acts as described should be so reprehensible to any representative of an American Court, unless we are to accept and believe that the system of justice in the State of New York has been allowed to degenerate into a neo-nazi system allowing a gestapo type dispensation of the individual rights of it's citizens, without any regard for Constitutional mandates as to the rights and privileges which



may not be abridged.

The District Court erred in its findings that appellant raised an identical issue in an Article 78 Proceedings in the Nature of Mandamus. Appellant's issue in that proceeding dealt basically with argument of a capricious and arbitrary parole denial and the relief sought was re-appearance before the Board and for an Order to Show Cause why the Parole Board did not afford appellant with a meaningful reason in support of the denial. Whereas the District Court's determination that the identical issues were presented to both the State Court and District Court is baseless and without the support of the record. The issues raised in the complaint contended that the Parole authorities employed and utilized illegal and surreptitious methods to violate appellant when he was adjudicated a Parole Violator four months after the legal expiration of his maximum term after being duly released from Parole supervision and informed by the very parole authorities that he was a "free" man. It was further contended therein that for a Declaration of Delinquency to be legally valid, a Notice of Charges culminating in such violation must be served upon the violator apropos. A violation must be based upon actual violation, not upon suspicion or assumption.

The failure of the Parole authorities to serve appellant with the requisite Notice of Charges/Violation or to afford appellant with the mandated preliminary and Final Revocation Hearings is indicative that appellant could not have violated the conditions under which he was released thereby disclosing the dilatory and ambiguous acts serving to thereby deprecate and violate appellant's 14th Amendment rights as provided by the U.S. Constitution. (see: Hickman V. Arkansas Bd. of Pardons and paroles, 361 F.Supp.



864).

The above insidious procedures as employed by the Parole authorities if allowed to proliferate, would serve to perennially jeopardize a Parolee long after his term as imposed by a sentencing court terminates upon the mere suspicion and assumption emanating from an accusation devoid of substance.

The District Court's reliance upon the cited cases of: Lombard V. Board of Education, 502 F.2d 631 at P.636-37 (2d.Cir. 1974); Thistlethwaite V. City of New York, 497 F.2d 339 (2d.Cir. 1974) and Lackawanna Police Benevolent Ass'n. V. Bolen, 446 F. 2d 52 (2d Cir. 1971) as a basis to dismiss the complaint is therefore negated due to the un-related issues presented to each court. The rules of res judicata in which the District Court applied to the instant matter determining issue preclusion is inapposite and without the support of the record to allude thereto.

....CONCLUSION....

WHEREFORE, it is respectfully submitted that the judgment under review should be reversed and the Complaint made pursuant to the provisions of Title 42 U.S.C. section 1983 be remitted to the Northern District Court for an evidentiary hearing upon the merits contained therein.

Respectfully Submitted:

Warren Graves  
WARREN GRAVES  
Appellant-pro se  
135 State Street  
Auburn, New York  
13021



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PLAINTIFFS

DEFENDANTS

GRAVES, WARREN

OLGIATI, ENNIS J., Chairman of  
the New York State Board of  
Parole

CAUSE Plaintiff alleges defendant illegally  
changed maximum expiration date on his first  
conviction from 1/6/75 to 5/23/76

76-CV- 298

ATTORNEYS

Warren Graves  
135 State St.  
Auburn, N. Y. 13022

76-211

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PROCEEDINGS

July 14	1	Filed Civil Rights Complaint
" 21	2	Filed Memorandum-Decision and Order of Judge Port (7/19/76) denying and dismissing the civil rights complaint. The Clerk is directed to file the papers without payment of fees.
" 21	3	Filed Judgment
Aug. 3	4	Filed Notice of Appeal

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA, ex rel.  
WARREN GRAVES,

Plaintiff,

-against-

ENNIS J. OLGATI, Chairman of the  
New York State Board of Parole,

Defendant.

76-CV- 298  
76-CV-

EDMUND PORT, Judge

Memorandum-Decision and Order

The Clerk of the court has sent to me for my consideration a civil rights complaint, together with an affidavit in forma pauperis and for the assignment of counsel from a state inmate presently confined in the Auburn Correctional Facility, Auburn, New York.

It appears from the complaint that while plaintiff was out on conditional release, he was arrested for the crime of rape. While awaiting trial, he alleges that his maximum expiration date was reached. Plaintiff was ultimately convicted of the Rape charge. The claim appears to be that his mere arrest could not interrupt service of his sentence, that said sentence expired on January 6, 1975; he states the defendant has illegally changed his maximum expiration date on his first conviction to May 23, 1976.

Plaintiff brought an Article 78 proceeding in the Cayuga County Supreme Court on the identical grounds, the action being dismissed on the merits by Supreme Court Justice Robert E. White on May 13, 1976. Graves v. Olgati, index no. 76-3161. Plaintiff does not



inform us of whether or not an appeal from this determination was taken.

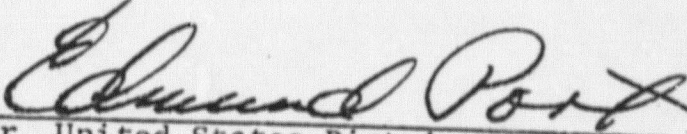
Plaintiff need not, of course, present his constitutional claims to a state court prior to commencing his civil rights action herein; but, having done so, it is my opinion he is bound by the state court's determination as "where a constitutional issue is actually raised in the state court, as it can be in an Article 78 proceeding... the litigant has made his choice and may not have two bites at the cherry." Lombard v. Board of Education, 502 F.2d 631 at p.636-37(2d Cir. 1974), and see Thistlethwaite v. City of New York, 497 F.2d 339 (2d. Cir. 1974) and Lackawanna Police Benevolent Ass'n. v. Bolen, 446 F.2d 52 (2d Cir. 1971).

An examination of the papers in the state court proceeding reveals that the plaintiff was declared delinquent on June 17, 1974 for violating the terms of his conditional release; this action would interrupt service of his sentence pursuant to N.Y. Penal Law §70.40 (3)(b).

The complaint will be denied and dismissed.

For the reasons herein, it is

ORDERED, that the complaint herein be and the same hereby is denied and dismissed. Leave to proceed in forma pauperis is granted and the Clerk is directed to file the papers herein without the payment of fees.

  
Sr. United States District Judge

Dated: July 19, 1976.  
Auburn, New York.